LEE KOK ENG v. PUBLIC PROSECUTOR

[F.C. (Gill Ag. L.P., Ali Ag. C.J. (Malaya) and Wan Suleiman F.J.) October 3, 1975]

[Ipoh — Federal Court Criminal Appeal No. 8 of 1975]

Criminal Law and Procedure — Charge of murder — Allegation that murder committed in course of and in furtherance of common intention to commit robbery — Circumstantial evidence — Admissibility of confession — Information relating to discovery of money taken in robbery — Possibility of returning lesser verdict of culpable homicide — No miscarriage of justice — Evidence Act, 1950, s. 27(1) — Penal Code, ss. 34 and 302.

Penal Code, ss. 34 & 302 — Murder — Circumstantial evidence — Courts of Judicature Act, 1964, s. 60(1) proviso.

Evidence — Circumstantial — Confession — Evidence Act, 1950, s. 27(1).

This was an appeal against the conviction of the appellant for murder. The charge alleged that the murder was committed in the course of and in furtherance of the common intention of the appellant and three others to commit robbery. Among the grounds of appeal raised were that (1) there was a misdirection of the law relating to common intention; (2) the learned trial judge failed to direct the jury as to when and subject to what conditions an inference adverse to an accused person may be drawn; (3) the confession of the appellant was wrongly admitted; (4) evidence relating to information given by the appellant to the police in relation to the discovery of money and other objects was wrongly admitted; (5) the learned judge did not put the defence adequately to the jury; (6) the learned trial judge failed to direct the jury as to the possibility of returning a verdict of culpable homicide not amounting to murder.

Held, dismissing the appeal: (1) the learned trial judge had given sufficient direction on the law relating to common intention;

(2) the learned trial judge had given an adequate direction to the jury which was tantamount to telling them that unless the only conclusion to be drawn from the circumstantial evidence was that the appellant was present at the robbery they must not act on it;

(3) it was for the defence counsel to recall any of the witnesses whom he liked to cross-examine them in the presence of the jury on the issue of voluntariness of the confession and as he had failed to do so, it could not be argued that the accused was given no opportunity and the learned trial judge was correct in admitting the confession;

(4) the evidence of information to the police relating to the discovery of money and other objects was rightly admitted under section 27 of the Evidence Act, 1950;

(5) the learned trial judge had in his summing up referred adequately to the defence, which was one of alibi. There was nothing in the summing-up to support the argument that he told the jury that the appellant's alibi required corroboration or that there was any burden on the appellant to show that his story was true;

(6) in this case the failure of the trial judge to direct the jury on the need to consider the lesser verdict of culpable homicide not amounting to murder was not such a misdirection as would lead to a miscarriage of justice. In the circumstances this was a case in which the proviso to section 60(1) of the Courts of Judicature Act 1964 should be applied.

Cases referred to:-

(1) *Rex* v. *Murray* [1951] 1 K.B. 391, 393.

(2) *Chan Wei Keung* v. *The Queen* [1967] 2 A.C. 160.

(3) *Reg.* v. *Tan Choot & Anor.* (1867) 4 Ky. 75.

(4) *Chung Kum Moey* v. *Public Prosecutor* [1967] 2 M.L.J. 205.

FEDERAL COURT.

Edgar Joseph Jr. (*Kumarendran* with him) for the appellant.

Abdullah bin Ngah (Deputy Public Prosecutor) for the respondent.

Gill Ag. L.P. (delivering the judgment of the Court): The appellant and another man were tried in the High Court at Penang before Arulanandom J. and a jury on the following charge —

"That you jointly with one Toh Ngoh Tee (since deceased) and one other still at large, on July 7, 1973 at about 12.20 p.m. at the Mercantile Bank, No. 11 Beach Street, in the District of Georgetown, in the State of Penang, committed murder by killing one Jan Mohamed s/o Noor Mohamed and you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the said Code Cap. 45."

The jury by a majority of six to one found the appellant guilty as charged. The learned judge concurred in the verdict, convicted the appellant and sentenced him to death. We dismissed his appeal to this court and now state our reasons.

The evidence adduced for the prosecution in support of the charge briefly was that on July 7, 1973 at about 12.20 p.m. three male Chinese armed with pistols entered the Mercantile Bank at No. 11 Beach Street, Penang and made their way towards the cashiers' enclosure. Two of them jumped over the counter and entered the cashiers' cage. The third man stood in the foyer outside the counter with his gun pointed in the air. The deceased, who was a watchman employed by the bank, went up to this third man and caught hold of him from the rear. At this juncture a shot was fired.

In the meantime the two gunmen who entered the cashiers' cage had at gun point collected the money on the cashiers' table and put it in a sack. The amount taken was $56,910. They both left the cashiers' cage by jumping over the counter and one of them who was carrying a bulging sack and a pistol went to the assistance of the third man who was being held by the watchman. He hit the watchman from the back. After that the firing of a shot was heard and the watchman fell down on the ground. The three robbers were seen running out of the bank into a waiting taxi which was parked there. The taxi had registration No. H. 8934. There was also a driver in it. There was evidence of a witness who saw the taxi parked there earlier. The taxi moved slowly as the three men got in and then sped off. When the police arrived, the watchman was already dead.

The taxi in which the gunmen made their get-away was earlier robbed from its owner or driver one Mr. Goh Choon Keat. His evidence was that at about 10 a.m. on the day of the robbery he was waiting for fares at the taxi stand along Prangin Road, Penang when the appellant came to hire his taxi to go to Vale of Tempe. The appellant had a paper bag and got into the front seat of the taxi. As he was about to drive off the appellant asked him to wait for three other persons, who later arrived and got into the back seat of the taxi. He was told to drive along Burmah Road, at the end of which he was asked to cross over to Mount Erskine Road. At a place near the Hock Hin Terrace he was asked to reverse his taxi for some distance and to enter a side road. He protested as the road was not good but at that time one of the three men in the back seat, a stout person, pointed a small arm at him. He also felt another gun being pressed against him.

As the taxi was moving along it got into a large pot hole on the road. He tried to move his vehicle out of the hole slowly. At that moment he saw the appellant pointing a weapon at him. After he had driven for some distance he was asked to stop and get out of the driver's seat and occupy the back seat. The person described as the stout person took over the wheel. The appellant then joined the other two at the back seat to tie him up with thin metal wires. His ankles and his wrists were tied and so was his mouth after a piece of cloth was shoved into it. He was then bodily lifted from the taxi and dumped into the luggage boot.

As he was in the luggage boot he felt the taxi move and stop at a place near the seaside as he could hear the sound of waves. The taxi moved again and stopped again along the seaside. Then it moved on and picked up speed. Then it stopped. After some time he heard the doors of the taxi being slammed three times. He also heard the sound of a gun shot. Following that he heard the doors of the taxi being slammed and it was driven off at a fast speed. Then the taxi stopped with its engine still running. After some time he heard children near the taxi. He lifted the cover of the boot and found that the taxi was near Khoo Kongsi in Pitt Street. He then went to the police to make a report.

Following investigations the appellant was arrested on July 13, 1973 in a house in Jalan Durian, off Jalan Ipoh, Kuala Lumpur. Superintendent Govindasamy who arrested him found $430 in $10 currency notes bound with a rubber band in an almeriah in a room in the front portion of the first floor of the double storey terrace house. The appellant was later handed over to ASP Ariffin of the Penang police. As a result of questioning the appellant took ASP Ariffin to the back of a coffee shop at No. 46 Batu Ferringhi Penang. Near a chicken coop at the back of the coffee shop the appellant dug out a plastic bag containing $6,500 in currency notes of various denominations. On July 15, 1973 ASP Ariffin brought the appellant back to Kuala Lumpur. On July 16 the appellant made a confessional statement to the magistrate in Kuala Lumpur. On July 17 he was brought back to Penang. On July 18, 1973 he and ASP Ariffin went to 15th Milestone at Balik Pulau Road, Penang where, from under a foilage in the ravine on the right hand side of the road as one faces Balik Pulau, the appellant produced a pair of motor car number plates NC. 8441 and a shoe box size 6½ King's Brand. Incidentally, the police had earlier found a pair of shoes at the scene of the robbery at the bank and this pair of shoes were also of King's brand, size 6½.

On July 21 the appellant took ASP Ariffin and Superintendent Govindasamy to 17¾ Milestone Kuala Lumpur/Rawang Road where they met a woman named Cheng Sow Chan who produced from a room at the back portion of the house a Dumex tin containing $4,450 in $10 notes. The lady also produced a smaller plastic bag containing $1,900 in cash. The same day ASP Ariffin received another $500 in cash in various denominations from another woman named Liew San Yin.

On July 25, 1973 an identification parade was held at the police headquarters in Penang where the taxi owner/driver Mr. Goh Choon Keat identified the appellant. The police had dusted the boot of the taxi for finger prints and found finger prints which matched the finger prints of the appellant.

Apart from the appellant's own statement to the magistrate in which he admitted going to the bank with three others and putting money into a paperbag which he was carrying, the case for the prosecution was based on circumstantial evidence to show that the appellant was involved in the robbery at the Mercantile Bank at No. 11 Beach Street Penang on July 7, 1973. The charge against the appellant, as already stated, ws one of murder committed in the course and in furtherance of a common intention of himself and three others to commit the robbery.

In his direction to the jury on the question of common intention the learned trial judge read section 34 of the Penal Code which provides: —

"When a criminal act is done by several persons, in furtherance of the comon intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone."

He then went on to say:

"This means simply that when several people intend to commit a criminal act, *e.g.* robbery, and they confront a person and one stands guard with a gun while the others actually remove his possessions, then all are guilty of armed robbery although some may have been armed and some did not actually take anything away. Similarly, in this case, the prosecution need not prove actually which of the three who entered the bank fired the shot which killed Jan Mohamed. If the prosecution prove that they were armed and entered the bank with the intention of robbery and using firearms in case of any resistance and if in the course of the robbery a person is killed by intentional shooting, then all are guilty of murder."

Counsel for the appellant submitted that this was a misdirection of the law relating to common intention. We found no substance or merit in his submission as we were of the opinion that what was said by the learned trial judge was sufficient direction on the point. In this particular case he went on to illustrate by giving an example. Whether the pre-arranged plan of the robbers was merely to frighten and rob and not to kill was a matter for the jury. It seemed clear from the evidence that the killing of the watchman of the bank took place as the robbers were rushing out of the bank and in an attempt to free one of their men who was then being held by the deceased watchman.

One of the grounds of appeal was that the learned trial judge failed to direct the jury as to when and subject to what conditions an inference adverse to an accused person may be drawn. This ground was clearly directed to the circumstantial evidence against the appellant. In directing the jury on this point the learned trial judge said —

"But when considering circumstantial evidence you must make sure it points to only one conclusion. If the evidence is capable of two or three conclusions, then the conclusion most favourable to the accused must be given."

In our judgment that was adequate direction to the jury in that it was tantamount to telling them that unless the only conclusion to be drawn from the circumstantial evidence was that the appellant was present at the robbery they must not act on it.

The appellant had been tried on the same charge previously but that trial was held to be a nullity and a retrial was ordered. In the earlier trial the appellant's confession was not admitted in evidence. It was argued on behalf of the appellant that in view of the rejection of the confession at the earlier trial no evidence should have been given of it in the present trial. The argument was that regardless of what happened to the earlier trial the trial within the trial in which the confession was rejected had not been held a nullity. We found no cogency in that argument. It was the whole of the earlier trial which was held a nullity and it was for that reason that a retrial was ordered.

A large number of grounds were raised in the amended supplementary petition of appeal with regard to the confessional statement of the appellant. One of the major grounds in this connection was that the record did not show that the appellant was given the opportunity to cross-examine the relevant police witnesses over again on the issue of voluntariness in the presence of the jury. But there was nothing in the record to show that defence counsel was denied the opportunity to cross-examine police witnesses in the presence of the jury. In this connection it is important to bear in mind the following passage from the judgment of Lord Goddard C.J. in *Rex* v. *Murray*: [1]

"It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again in the witness-box witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."

It is clear from the above statement of law that it was for the defence counsel to recall any of the witnesses he liked to cross-examine in the presence of the jury. As he failed to do so, it could not be argued that the appellant was given no opportunity.

Rex v. *Murray* was approved by the Privy Council in *Chan Wei Keung* v. *The Queen*[2] in which their Lordships went on to say at page 172:

"Their Lordships are of opinion that the learned judge's direction to the jury is not open to criticism on the ground that he did not follow the course of giving the specific direction that the jury must be satisfied beyond reasonable doubt as to the voluntariness of the confessions before giving them any consideration."

In view of the above statement of the law by their Lordships we did not think that there was any substance in any of the other numerous grounds which were put forward in relation to the appellant's confession. As defence counsel had not cross-examined any of the witnesses who gave evidence as to the circumstances under which the confession was made, the learned judge in his summing-up told them very briefly what ASP Ariffin, Superintendent Govindasamy and other witnesses including the appellant had said at the trial within the trial in relation to the confession. It was submitted that this was a misdirection, but we did not agree with that submission. What the learned trial judge told the jury was this:

"In view of all the circumstances I came to the conclusion that the statement was a voluntary one and hence admissible. So I have made a ruling of law that the statement is admissible and you are bound by it. The statement now forms part of the evidence and you are entitled to give full consideration to it. However what weight you give to it will depend on you.... So you may give as much weight to his statement as you think fit."

We found nothing in the nature of a misdirection in that part of the judge's summing-up.

There was a general ground of appeal that there was a miscarriage of justice in that the learned trial judge admitted and took into consideration in his summing-up to the jury a considerable body of irrelevant, inadmissible and gravely prejudicial evidence in breach of explicit statutory prohibition. All this was directed to the information which the appellant gave to ASP Ariffin in relation to the discovery of money both in Penang and in Rawang, the car number plates and the shoe box. In our judgment all such evidence was admissible under section 27(1) of the Evidence Act, 1950. It was clear that the appellant gave the information when he was in police custody and was accused of the offence charged. In his summing-up the learned trial judge referred to the house at Rawang as an unnumbered house and away from the main road. That was obviously a mistake as the house was numbered and there was no evidence as to whether it was away from the main road, but we did not see how we could treat that as a material misdirection.

Our attention was drawn to the fact that the foreman of the jury, during the viewing of the *locus in quo* with his brother jurors, had some communication with an officer of the bank about the conviction of the appellant in his earlier trial. It was said that though the matter was reported to the learned trial judge he did not hold an inquiry into the matter or say anything to the jurors in the course of his summing-up. It appeared clear to us from the record that the learned trial judge made no inquiry about it, but he did warn the jury that they were to decide the case only on such evidence as had been adduced before them in court. This alleged conversation by the foreman of the jury did not take place at the end of the trial as in the case of *Regina* v. *Tan Choot & Anor.*,[3] which was cited to us in support of the proposition that the conviction of the appellant should be quashed.

It was next contended on behalf of the appellant that the learned judge in his summing-up to the jury did not consider the defence adequately or at all. We could not find any basis for this contention in view of the following direction by the learned trial judge to the jury as regards the appellant's evidence:

"Here his evidence about the robbery is an alibi. If it raises any genuine doubt in your minds then you must give him the benefit of the doubt. But you must consider his defence in the light of all the evidence adduced before you. Sometimes it is difficult to get corroborative evidence for alibis. He states he went swimming with his girl friend after being a witness to an armed robbery. If he were not to be involved would the other three have taken him to rob the taxi? And would any of them have (sic) brought the robbed money back to him? Is the taxi driver trying to frame him? Are ASP Ariffin and Supt. Govindasamy trying to frame him? What connection did the shoes found at the scene of murder have with the box shown by the accused? What about the money recovered through his help? What about his statement? No doubt the bank officers did not identify. But there are many instances in life especially when there is excitement, danger or movement that you yourselves cannot identify. And in fact when one is not sure one must not identify lest you put wrong people in trouble. But absence

of identification is not conclusive proof that the person was not there. You have to consider all the other evidence which may exist to connect the person. So if what the accused has told you is consistent with his innocence or even raises doubt in your minds about his connection with the robbery and the killing then you must acquit him."

There is nothing in that part of the learned trial judge's summing-up to support the argument that he told the jury that the appellant's alibi required corroboration or that here was any burden on the appellant to show that his story was true.

There were numerous other grounds as set out in the rather lengthy petition of appeal. In our judgment there was nothing in them to warrant a detailed examination of them.

The last ground we had to deal with was that the learned trial judge failed to direct the jury adequately or at all as to the possibility of returning a verdict of culpable homicide not amounting to murder, even though this possibility was not raised by the defence. For this counsel for the appellant relied on the Singapore case of *Chung Kum Moey* v. *Public Prosecutor*.[4] In our judgment the facts in that case were quite different from the facts in the present case. In that case the shots were fired in order to frighten the deceased into handing over his keys and to prevent him from reaching the telephone and the trial judge had formed the view that the accused's intention was only to shoot the deceased in the forearm. In the present case a shot was fired in the back of the deceased in order to make him loosen his grip of one of the robbers so that all three of them could make a clean getaway. It was clear from all the evidence in the case that the robber who was held by the deceased had been unable to get himself released. The other two were obviously not going to leave him behind to be used as a witness against them. Their intention, therefore, was obviously to shoot to kill.

All the indications were that it was the appellant who fired the fatal shot. In his statement to the magistrate the appellant had said that he ran to the office and put the money into the paper bag. There was evidence that the shot which killed the watchman was the second shot which rang out when the robber coming out of the cashiers' cage and carrying a bulging sack and a pistol went to the aid of the robber who was still being held by the watchman and hit the watchman from behind. Although no one identified the appellant as the robber who hit the watchman from the back, he was the only one carrying the bulging sack. In all likelihood therefore he was the robber who fired the shot just before the watchman fell. The first shot which rang out when the watchman was holding the robber in the foyer went off when the gun was being held pointed upward in the air. The wound which killed the watchman was from the back going through the abdomen and the intestines. Another reason for surmising that it was the accused's gun shot which killed the watchman was that a new pair of shoes was found near the watchman and the accused led the police to a spot where the box belonging to the shoes was hidden.

In our judgment the failure to direct the jury on the need to consider the lesser verdict of culpable homicide not amounting to murder was not such a misdirection as would lead to a miscarriage of justice. In the present case we think the probabilities were very strong that even if the jury had been directed on the need to consider the lesser verdict they would in view of the evidence at the trial inevitably have reached the same conclusion. For this reason we were satisfied that this was a case in which the proviso to section 60(1) of the Courts of Judicature Act, 1964 should be applied and we did so.

For the reasons we have stated we dismissed the appeal.

Appeal dismissed.

Solicitors: *Kumar, Chan & Chia.*

ROYAL INSURANCE GROUP v. DAVID

[F.C. (Gill Ag. L.P., Ali Ag. C.J., Wan Suleiman F.J.) October 3, 1975]

[Ipoh — Federal Court Civil Appeal No. 51 of 1975]

Contract — Del credere agency — Liability in respect of insurance premiums — Civil Law Act, 1956, s. 5(1).

Insurance — Agent — Liability in respect of insurance premiums.

The appellant company had claimed the sum of $1,981.72 being the amount of premia due in respect of policies issued by the appellants through the respondent as their *del credere* agent. Judgment was given for the appellants in the Sessions Court at Ipoh but on appeal to the High Court, the learned trial judge allowed the appeal and dismissed the claim. The appellant appealed to the Federal Court.

Held, allowing the appeal: as the respondent was a *del credere* agent he was liable irrespective of whether or not he had collected the premia from the persons to whom the policies were issued through his agent. There was no dispute in this case as to the quantum of premia claimed from the respondent and the amount claimed was therefore an ascertained sum.

Cases referred to:-

(1) *J.M. Wotherspoon & Co. Ltd.* v. *Henry Agency House* [1962] M.L.J. 86.

(2) *Thomas Gabriel & Sons* v. *Churchill & Sim* [1914] 3 K.B. 1272, 1279.

(3) *Rusholme & Bolton & Roberts Hadfield Ltd.* v. *S.G. Read & Co. (London) Ltd.* [1955] 1 W.L.R. 146, 151.

(4) *International Railway Co.* v. *Niagara Parks Commission* [1941] A.C. 328.

(5) *Morris* v. *Cleasby* 105 E.R. 943, 947.

(6) *Nind* v. *Marshall* 129 E.R. 746, 749.

(7) *Bankers and Traders Insurance Co. Ltd.* v. *Allied Insurance Services* [1969] 1 M.L.J. 81.

FEDERAL COURT.

V. T. Nathan for the appellants.

L. H. Singh for the respondent.

Gill Ag. L.P. (delivering the judgment of the Court): This was an appeal against the decision of Hashim Yeop A. Sani J. allowing the respondent's appeal from a judgment against him as defendant in an action in the Sessions Court at Ipoh in which the appellant insurance company as plaintiffs made a claim for a sum of $1,981.72 being the mount of premia due in respect of policies issued by the plaintiffs through the defendant as their agent. We allowed the appeal and now state our reasons.